Supreme Court, U.S.
FILED
MAY 14 1997
OFFICE OF THE CLERK

No. 96-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
GARY S. FEINERMAN
JOSEPH A. STARKMAN
MARC R. LISKER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

In its Brief, the United States suggested that this Court hold the Petition in this case pending this Court's decision in *Johnson v. United States*, No. 95-6556, and that the Petition then be "disposed of accordingly." U.S. Br. 7. On May 12, 1997, this Court announced its decision in *Johnson*. As the Court's opinion makes clear, *Johnson* does not, and makes no attempt to, resolve the question presented by petitioner, *i.e.*, whether the failure to instruct the jury on an essential element of an offense can ever constitutionally be "harmless" under *Chapman v. California*, 386 U.S. 18 (1967), and *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), where a timely objection to the error is made at trial. To the contrary, *Johnson* explicitly left this important question for another day. As explained in the Petition, this case provides the Court with an ideal vehicle to resolve that question.

The Court's decision in *Johnson* strictly involved an application of the plain error doctrine of Fed. R. Crim. P. 52(b), because the defendant failed to object to the error in question at trial. This Court held that the error in that case was not reversible under Rule 52(b) because the petitioner did "not meet the final requirement" of the plain error test articulated in *United States v. Olano*, 507 U.S. 725 (1993). See Slip op. at 8. Given the narrow scope of this holding, this Court emphasized that it "need not decide th[e] question" of whether the instructional omission of an essential element could ever constitutionally be considered "harmless." *Ibid.*

Johnson itself confirms the need for Supreme Court review of the question presented here. As the Court noted, the question of whether the failure to submit an essential element to the jury can ever be harmless "is by no means clear." Slip op. at 8. This Court also pointed out that, under its harmless error decisions, removal of an essential element from the jury "can just as easily be analogized to improperly instructing the jury on an element of the offense * * *, an error which is subject to harmless-error analysis, as it can be to failing to give a proper reasonable-doubt instruction altogether" (*ibid.*), which is not amenable to harmless error review. See *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

In any event, the Court's decision in *Johnson* purports neither to address nor to answer the question presented here. Accordingly, *Johnson* clearly will not resolve the irreconcilable conflict that now pervades the circuits and the state courts of last resort on the question of whether the instructional omission of an essential element can constitutionally ever be harmless. See Pet. 11-16. For all of these reasons, and because this important and recurring question is ideally framed for review in this case, Petitioner respectfully urges the Court to grant the Petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KATHLEEN M. WILLIAMS
Federal Public Defender
RICHARD C. KLUGH
Assistant Public Defender
150 West Flagler St.
Miami, Florida 33130
(305) 536-6900

JAVIER H. RUBINSTEIN
Counsel of Record
JAMES D. HOLZHAUER
GARY S. FEINERMAN
JOSEPH A. STARKMAN
MARC R. LISKER
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(312) 782-0600

Counsel for Petitioner

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